LEE SAU KENG (f) v. YONG HON FA.

[O. C. J. (Whitton, J.) September 21, 1952]

[Kuala Trengganu — Civil Suit No. 5 of 1949]

Lease — Lease of chattels — Sub-lease — Claim for rent — Counterclaim for refund — Stoppage of work because of Japanese invasion — Failure of contribution.

In June 1940 the defendant hired certain chattels at a monthly rent of $600 from the Administrators of an estate for the purpose of mining certain lands in Trengganu already sub-leased to him by the same Administrators. The defendant mined the lands until 12th December 1941 when the Japanese invasion stopped work. After the war work was resumed on part of the lands. During the Japanese occupation a portion of the chattels were lost or destroyed; the defendant retained and used the surviving chattels after mining operations were resumed.

By virtue of the sub-leases the defendant undertook to repay, and did so, the sum of $75,000 due to certain creditors of the deceased's estate. It was agreed this sum should be treated as the equivalent of tribute payable for a period of four years, and that subsequently tribute should be paid at the rate of 10% on all ore removed from the said lands after the expiry of four years. In the sub-leases the following clause appeared: "That during the period of the first four years of this sub-lease should Yong Hon Fa "(the defendant)" be forced to stop work on all the mining lands on account of act of Providence, fire, earthquakes, floods, lightning, war, no price of ore and such-likes, the administrators of the estate shall prolong the sub-lease to such an extent as to cover the period lost in order to complete the four years."

The plaintiff, who had now become the administratrix of the estate in question, sued the defendant for rent of the chattels in respect of the period subsequent to December 1941.

The defendant counterclaimed that by reason of the clause in the sub-leases quoted above he was entitled to have returned to him a portion of the $75,000.

Held on the claim: in the absence of any express provision to the contrary in the hiring agreement, defendant was liable to pay rent or equivalent remuneration at the agreed rate as long as he retained the chattels, except in respect of certain chattels to the removal of which during the Japanese occupation the plaintiff herself was a party.

Held on the counterclaim: there was nowhere in the sub-leases any undertaking, express or implied, for the refund of the $75,000 or part thereof in consequence of the contingencies set out in the clause relied on, and that, therefore, the counterclaim could not succeed on this ground.

Held further: the counterclaim could not succeed on the ground that there had been failure of consideration.

Cases referred to :—

(1) *M. C. Corbett v. Ipoh Tin Dredging Limited* (1936) M.L.J. 15; (1935) F.M.S.L.R. 154.

(2) *Paradine v. Jane* (1647), Aleyn 26.

(3) *Matthey v. Curling* (1922) 2 A.C. 180, 232.

(4) *Jacob v. Credit Lyonnais* (1884) Q.B.D. 589, 603.

(5) *Taylor v. Caldwell* (1863), 3 B. & S. 826.

(6) *Scott v. Del Sel* (1922) S.C. 592, 596.

(7) *Luxor (Eastbourne) Ltd. v. Cooper* (1941) A.C. 108, 137.

(8) *Stirling v. Maitland* (1864), 122 E.R. 1043.

(9) *Anglo-Egyptian Navigation Company v. Rennie & Anor.* 10 C.P. 271.

(10) *Biggerstaff v. Rowatt's Wharf Limited* (1896) 2 Ch. 93.

CIVIL SUIT.

H. E. P. P. Powell for the plaintiff.

R. H. V. Rintoul for the defendant.

Cur. Adv. Vult.

Whitton, J. : — On the 27th June 1940 by a written agreement Lim Chiap Boon and Lui Ah Thiam, the Administrators of Lui Ah Hon deceased, hired to the defendant certain chattels, for the purpose of mining lands they leased on the same day to the defendant, in consideration of the payment of a monthly rent of $600. A list of the chattels was attached to the agreement.

The plaintiff, who is now the Administratrix of the estate of Lui Ah Hon and sues in that capacity, claims a sum, which for present purposes may be put in round figures as being between $40,000 and $50,000, is due by the defendant under the agreement.

The defendant admits the hiring of the chattels and expresses his willingness to pay a sum, which he contends should be fixed after enquiry, under the terms of the agreement, but denies liability, on grounds arising out of events during the Japanese Occupation and of subsequent conditions, for payment of rent on the scale demanded by the plaintiff.

The defendant in a counterclaim based on a clause in the leases referred to above claims that a sum of approximately $40,000 is due to him by the plaintiff.

The invasion of Malaya, or to put the matter more precisely of the State of Trengganu, by the Japanese military forces in December 1941 was the *fons et origo* of the differences which have arisen between the parties. The mines leased in June 1940, which are commonly called Bundi and Pelantok, are tin mines situated in the Chukai (or Kemaman) area of Trengganu. The chattels hired were at the time of the hiring situated partly on one and partly on the other mine. Also included in the hiring was a house in the town of Kemaman bearing the number 128. As to the facts relevant to the case there is much which is in dispute, but there is also a good deal which is common ground, and I propose at this stage to enumerate certain important facts as to which there is no dispute :—

(1) That an Agreement for the hiring of the chattels was entered into on 27th June 1940.

(2) That two sub-leases in respect of the Bundi and Pelantok mines were executed on the same date.

(3) That work stopped on both mines on 12th December 1941 owing to the invasion of the Japanese military forces.

(4) That house 128 Kemaman was destroyed by explosion about the time of the Japanese Surrender (September 1945).

(5) That work was never resumed on Pelantok mine after the War.

(6) That the Bundi concession expired on 20th November 1947.

(7) That the Mining Certificates covering the areas comprising Pelantok expired in December 1948.

Turning now to the facts in dispute I shall first summarise the plaintiff's version of what happened, then the defendant's, and subsequently shall set out my findings in respect of the basic disputed facts, and the reasons for my conclusions.

The plaintiff, who is at present aged about 38, is the widow of the deceased. She stated that she was appointed Administratrix of the estate in 1943 by a Japanese Court, and that about 1948 a Grant from a Malayan Court was substituted for the Japanese one. When the Japanese arrived she was living in Kemaman, but then evacuated to Bundi and stayed with the defendant and his wife for a while, and some while later she returned to Kemaman.

The general tenor of her evidence was that she had not interfered with the defendant's administration of the mines during the Japanese Occupation, although she admitted paying a visit to Bundi. She maintained, however, that she had been forced to go there by the Japanese. She denied that she had removed any of the chattels at any time. She said that the defendant resumed operations in Bundi in December 1945, and has continued to work that mine up to the present time. The plaintiff was not prepared to concede that the chattels (apart from house number 128 Kemaman) covered by the hiring agreement had not remained substantially intact throughout the period of the Japanese Occupation.

The defendant, Yong Hon Fa, stated that after the sub-leases were signed he started mining at Bundi and Pelantok. At Bundi there was both alluvial and illuvial ground, the former operated by gravel pumps, the latter by underground workings. Prior to the stopping of work in 1941 fifteen gravel pumps and seven "adits" were in operation at Bundi. At Pelantok at that date there was one "adit", one gravel pump, and one "lampan" in operation. At the time the sub-leases were signed he paid $83,400 to the estate of Lui Ah Hon. When the Japanese arrived he hid certain petrol stocks at Bundi, and some quantity of tin-ore both at Bundi and at Pelantok. In 1942 he was questioned by the Japanese Military Police regarding petrol and tin stocks, but successfully evaded discovery by the Japanese of the stocks he had hidden. In January 1943 he received a letter, a copy of which is at page 1 of the Agreed Correspondence, requesting payment in full of rent due at the rate of $600 per month in respect of "mining land". He succeeded for the time, however, in shelving the issue of the payment of rent. In August 1943 he received a letter from the plaintiff (at page 10 of the Correspondence) informing him that she had been appointed administratrix of her husband's estate, and demanding the payment of rent due. He acknowledged this letter by a reply (at page 11 of the Correspondence) enclosing rent $40 for the period 1st to 7th December 1941, but otherwise denying liability. In the course of August and September 1943 the plaintiff came to Bundi on three occasions. She came in parties which included Japanese members of a Japanese mining company and Japanese soldiers. During these visits certain chattels covered by the 1940 hiring agreement were removed. In October 1943 the defendant was arrested and taken to Kuala Trengganu where he was detained ten days. Just before his arrest he had received a letter (at page 24 of the Correspondence) from the Commissioner of Lands and Mines informing him that "by order of the Geologist Trengganu the mining works in the Bundi (sic) concession have been transferred to the Nippon Mining Company, Limited, Dungun, with effect 2nd July 2603 (1943)". On the 18th October the Siamese Government took over Trengganu and he obtained permission from the Siamese Governor to return to Bundi. He remained in Bundi until February 1944, and then left it because the Japanese Military Police refused to allow him to remain there. Apart from the chattels which had been removed during the plaintiff's visits in 1943 the hired chattels at Bundi were more or less in their original condition when he left Bundi in February 1944. In September 1944 he received certain information regarding Pelantok in consequence of which he wrote a letter (copy at page 26 of the Correspondence) to the plaintiff. He received in reply a telegram and a letter from the plaintiff (copies at pp. 27 and 29 of the Correspondence) denying that she had sold anything, but stating that she had heard from a Mr. Nakao that a Japanese mining company had removed the iron rails from the mining land at Pelantok. Both parties then approached the Authorities over their differences and a meeting to hear the compliants took place on 2nd December 1944 before an official known as Dato Bendara Luar. The defendant went on to say that all the remaining chattels at Pelantok except a Blackstone engine were removed by persons other than himself before the end of the Japanese Occupation. In February 1945 he received a letter (at page 36 of the Correspondence) from

the Japanese Authorities stating they were in urgent need of boats and "sampans", and later they removed two motor-boats and other craft all of which formed part of the hired property. The defendant recovered a small number of these vessels from the Custodian of Enemy Property after the re-occupation. The defendant paid his first visit to Bundi after the surrender of the Japanese in November 1945. He recovered within a short time the tin-ore both at Bundi and at Pelantok he had dumped, but it was not until August 1946 that he started to win tin-ore from the ground at Bundi. In that month the equipment with which he was working was three motor gravel pumps with old engines. He did not resume work on a larger scale until February 1947. After the War he made surveys of the condition of the chattels covered by the agreement both at Bundi and Pelantok. The findings of these surveys he recorded in documentary form, and they appear as annexures D2 and D3 to the Statement of Defence. A considerable proportion of the chattels covered by the agreement had either been removed or, in the case of the building, had collapsed.

Before recording my specific findings in respect of the material disputed issues of fact it is desirable to state the impressions I formed of the plaintiff and the defendant in the witness box. The plaintiff was not a straightforward witness, and at the conclusion of her evidence I made the following note on her demeanour: "witness in my view has evaded answers in cross-examination when she considered true answers would be damaging to her case." I saw no ground for adverse comment on the demeanour of the defendant; except as to one or two minor points (e.g. his war damage claim, the circumstances in which he secured his release from the Siamese Governor) he appeared to me to give his testimony frankly. I further formed the conclusion that it was plain in the light of the evidence before the Court that the plaintiff had been *persona grata* with the Japanese authorities, whereas the defendant had been in no such favoured position. It is not within my sphere to make moral reflections, but the plaintiff's undoubtedly amicable relationships with the Japanese is a circumstance which, in my opinion, must be regarded as materially strenghtening the probabilities of the defendant's story of the removal of the chattels. At this point I would say that, generally speaking, as between the plaintiff and the defendant I accept the defendant's evidence. I shall, however, now proceed to deal more fully with three of the most important issues on which they contradicted each other, namely the catalogue of the chattels covered by the agreement, the removal of the chattels, and the date of the resumption of work at Bundi.

As to the first of these matters the plaintiff stated she was not prepared to acccept the lists attached to the agreement as correct. I consider her repudiation of the lists is groundless. She was not a party to the 1940 ageement, and there is nothing to suggest she was in a position to know from personal observation what chattels were hired. Her objection appears to be based on a vague and unsubstantiated allegation that the original administrators had swindled her. Moreover she herself in 1949 by implication accepted the accuracy of the lists when she signed her plaint. I find as a fact that the lists attached to the agreement are a correct catalogue of the chattels hired.

As to the removal of the chattels the plaintiff maintained that the chattels, had, to all intents and purposes, remained intact throughout the Japanese Occupation. She was unconvincing under cross-examining as to her reasons for maintaining this, and several of her replies were either dishonest or foolish. The proceedings before the Dato Bendara Luar in December 1944, which I have referred to above, a copy of the record of which was admitted as Ex. D17, and which I accept as a correct record of what took place, in my view materially corroborates the defendant's story. The record contains the following notes:

"Regarding (6) dynamo and a bundle of wire are in custody of Lee Sau Keng according to her own admission before Towkay Lui Ah Thiam and also Che Man to-day."

"Regarding articles at Pelantok Lee Sau Keng stated not sold but have borrowed $17,000. Regarding rails at Pelantok they have been loaned to Nichinan, Kemaman."

It should be mentioned the second part of this translation is not quite accurate, a point which I shall deal with later, but there seems to be no doubt that the plaintiff admitted raising a loan of $17,000 on the rails. When cross-examined regarding this meeting the plaintiff began by denying that the removal of the rails and other articles from Pelantok, and the removal from Bundi of the dynamo and a quantity of wire had ever been discussed at the meeting. She then conceded that all the rails at Pelantok had been taken away by the Japanese. When it was suggested to her that other articles at Pelantok had been taken by the Japanese she disagreed, and said that they had been stolen by the defendant. Her evidence on these points is, in my opinion, clearly unreliable. In my opinion it is unreliable generally as far as the removal of the chattels is concerned. On the other hand the defendant's evidence as to the removal or decay (through neglect) of the chattels bore the stamp of truth. It was corroborated on material points — for instance by the record of the proceedings before the Dato Bendara Luar as to the articles discussed at the meeting of December 2nd, and by the witness Leong Foo Hing,

whom I saw no reason to disbelieve, on the same matter; by the letter from the Japanese authorities of which a copy is at page 36 of the Correspondence as to the removal of the sea-craft. I accept the evidence for the defendant as to the history of the chattels, and I reach the following findings of fact:

(1) That a proportion of the chattels covered by the agreement were no longer available to the defendant in December 1945 (I take this date as it is the date at which the plaintiff alleges work was resumed).

(2) That a proportion of such chattels were removed by the Japanese authorities.

(3) That in some instances the plaintiff willingly, and therefore not under duress, acquiesced in the removal of such chattels by the Japanese.

(4) That a proportion of such chattels had fallen into a condition of decay during the Japanese Occupation in the defendant's absence from Bundi.

(5) That House 128 Kemaman and the chattels contained therein (as set out at page 14 of the lists attached to the plaint) were completely destroyed by an explosion about September 1945.

(6) That there is no credible evidence to support the allegation the defendant stole any of the chattels during the Japanese Occupation.

I now pass on to the question of the date when work was resumed at Bundi. The plaint alleges the defendant re-started work on the mining lands in December 1945, and the plaintiff confirmed this in the witness-box, although the phrase she then used was "started operations". Under cross-examination she said that in giving this date she was relying on a letter from the defendant and on a statement to the same effect made by him to her. This letter (Ex. P4), or rather the letter attached to it (Ex. P4A) cannot, I think, be interpreted to mean that the defendant had actually re-started work at the date of writing. There was no independent evidence that the defendant had made a statement of this nature and, since as I have indicated, I find myself unable to believe the plaintiff where it is a case of her unsupported word against the defendant's, I cannot accept this assertion on her part. The defendant in the course of his evidence gave detailed information both as to the equipment on the two mines in 1941, including a statement of output he had compiled, which was not challenged (Ex. D12), and as to the position in these respects after the War (Ex. D21 refers). The defendant's evidence on this matter is corroborated by the reports made in the course of his duties by Mr. Hooi Cheng Wah, an official of the Government Mines Department, and in particular his reports which were admitted as Exhibits D28 and D29 are important. My conclusion on this aspect of the case is that I accept the defendant's evidence that work was resumed in August 1946 in the sense that from that date the winning of tin-ore from the ground was resumed, but that work on anything approaching normal scale did not recommence until February 1947.

It will be necessary in the course of this judgment to refer to other facts in this case, but those with which I have dealt are those on which, I think, the legal issues substantially depend. In considering the legal questions which arise it will be convenient to deal first with the claim, and then with the counterclaim.

Now as to the plaintiff's claim for rent for the chattels there is one matter on which, I think, no doubt has been thrown, either in the submissions of counsel or in the authorities cited in the course of the case or elsewhere, namely, that when parties explicitly provide in a contract for the position which is to govern their mutual obligations in the event of a specific contingency arising to interfere with the performance of the contract, and such a contingency does arise, then the legal position between them to the extent it is covered by the provision is what the parties have agreed it should be. In the third clause of the present contract (I follow the translation attached to the Statement of defence as it was made by a certified interpreter of the Supreme Court) there was included the following provision:—

"That the Second Party shall not be liable to indemnity against losses caused by act of Providence, fire, earth-quakes, floods, lightning, war and such-likes and it shall also not be liable to pay the monthly rents for the period of 'cease-work' caused by same."

It is not in dispute that there was a period of 'cease-work', and that this was caused by war. It is also not in dispute that the period of 'cease-work' commenced in December 1941. The parties are not agreed, however, as to the date on which this period ended. In this connection I have expressed my conclusion that work was resumed on a limited scale in August 1946, and on a normal scale in February 1947. The question arises is the term "cease-work" to be restricted to the period when no work whatever was being done, or is it to be taken as extending to anything short of work on a normal scale. It seems unlikely this point was weightily, if at all, considered by the parties at the time they entered into their agreement. Mr. Powell for the plaintiff relied on *M. C. Corbett v. Ipoh Tin Dredging Limited*[1] in which it was held that a dredge starts to work when it begins to carry out the purpose for which it is intended, namely, to dredge, whether the material dredged contains tin or not. I do not think that proposition will be disputed, but the problem in this case is rather more complicated. Since the parties themselves, however, were content to state the condition broadly, without any qualification as to what would constitute "cease-work", I do not

think it is for the Court to attempt to draw any fine lines of distinction. The work of a tin-mine is the winning of tin-ore from the ground. This work was resumed in August 1946, and I hold, therefore, that the "cease-work" period ended in that month. In the absence of fuller information the fairest course seems to be to deem resumption occurred in the middle of that month. I reach the finding accordingly that work was resumed on 16th August 1946, and in view of the terms of the third clause of the agreement, I hold that no rent was payable in respect of the period 12th December 1941 to 15th August 1946.

I now turn to consider the claim for rent in respect of the subsequent period. It is necessary for this purpose to examine again the agreement. The hiring or renting of the chattels was for four years, and the obligations of the defendant at the end of the four years are set out in the second clause which reads :—

"That after the expiration of the period of four years mentioned should the Second Party surrender all the engines and equipments and shop-houses on the mining lands as they are no longer required for its use the Second Party shall not be liable to pay rent."

I think the clause clearly means that after the expiration of the four years the defendant was to continue indefinitely under liability to pay rent until he should surrender the chattels. The question then to be decided is whether such liability is affected by loss or destruction of, or injury to, some of the chattels. The plaintiff contends that damage — employing the term as covering any impairment however caused of the use of the chattels — is irrelevant in this connection. In support of her contention the plaintiff relies on *Paradine v. Jane*[2]. At this point it is necessary to say a word on the nature of the contract with which we are dealing. The plaintiff's case rests on the basis that the agreement was a contract for the hiring of chattels. That leases of chattels can exist appears to be clear (*Woodfall*, Landlord and Tenant 23rd Ed. p. 106). I have not, however, come across anything on the subject which causes me to reject the view that this was a contract for the hiring of chattels and I accept this view. It is convenient to mention at this stage that the Civil Law Enactment 1937 of the Federated Malay States (Enactment No. 3 of 1937) which, save in so far as provision was or should be made by local written law and subject to certain other qualifications that do not arise here, applied the common law of England to the Federated Malay States, was extended to the State of Trengganu by the Civil Law (Extension) Ordinance, 1951 (Federation of Malaya Ordinance 49 of 1951). Apart from this the practice of applying the rules of English common law or equity to matters on which the local law is silent has long been followed. The law is settled, I think, that ever since *Paradine v. Jane*[2] the fact that a lessee has been deprived of the possession of his premises, except by title paramount, or even that the premises have been totally destroyed by accident, is no excuse for non-payment of rent in the absence of an express exception. *Paradine v. Jane*[2], moreover, applied the principle to the particular case of occupation by an alien enemy. In the present agreement no express exception was included to cover loss or damage to the chattels. It is, therefore, a crucial question whether *Paradine v. Jane*[2] applies to a hiring of chattels, or whether, as Mr. Rintoul for the defendant submits, the rule in *Paradine v. Jane*[2] has never extended beyond leases and charter-parties. In the leading case of *Matthey v. Curling*[3] the authorities on the subject were examined by Lord Atkinson. To my mind there is nothing in his judgment which suggests the rule is limited to the extent the defence submit it is. Lord Atkinson quotes a passage from the judgment of Bowen, L.J. (as he then was) in *Jacob v. Credit Lyonnais*[4] which puts the matter thus :—

"Now one of the incidents which the English law attaches to a contract is that (except in certain exempted cases as that of common carriers and bailees, of which this is not one) a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by vis major."

It may be that this reference to bailees was made in respect of gratuitous bailments as it seems clear (vide *Halsbury* Ed. 2 Vol. 1 p. 735) that in the case of a gratuitous bailment the bailee will not be liable in the event of casualties happening by an act of God, such as fire or tempest, or by the King's enemies, but there does not appear to be authority for saying that this general exemption from liability applies to other forms of bailment. It is plain, however, that there are in fact well established exceptions to the general principle enunciated by Bowen, L.J., in the passage I have quoted. Mr. R. O. McElroy in his book entitled "*Impossibility of Performance*", (Cambridge University Press, 1941) for the loan of a copy of which I am indebted to Mr. Rintoul, describes these exceptions as exceptions to "absolute" promises. Mr. McElroy indeed goes so far, if I understand him correctly, as to suggest (pp. 98 and 99) that the exceptions have so far eaten up the rule stated by Bowen, L.J., that the rule is now practically confined to charters of ships and leases of lands. If this is the true position it would follow that the submission for the defence mentioned above is, in effect at least, correct. Complementary to their submission that *Paradine v. Jane*[2] does not apply to this case the defence further maintains that *Taylor v. Caldwell*[5] does apply. I would sum up my opinion on the matter at this stage by

saying the principle of *Paradine v. Jane*[2] *prima facie* applies to the present contract, but the further question arises whether it is taken out of the scope of *Paradine v. Jane*[2] by reason of *Taylor v. Caldwell*[5]. The qualification of the general principle of obligation to perform a contract enunciated in *Taylor v. Caldwell*[5] is contained in the following passage :—

"The principle seems to us to be that, in contracts in which the performance depends upon the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.....that excuse is by law implied because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

It is important to consider again for a moment the contract in the present case. It was, as I have said, a hiring of certain chattels for four years. That period of four years expired on the 27th June 1944. From December 12th 1941 performance became impossible in consequence of the occupation of the country by enemy military forces. That contingency was expressly provided for in the agreement. The situation we have then is that impossibility of performance occurred, but that such impossibility was provided for in the agreement, so that the question of implied terms does not appear to arise as far as the main contract is concerned. The matter on which I am asked by the defence to hold an implied condition existed is a subsidiary one i.e. with reference to the return of the chattels at the conclusion of the hiring. Now, even supposing the rule in *Taylor v. Caldwell*[5] can be applied to merely subsidiary conditions in a contract, further difficulties from the point of view of the defence arise. It will probably be conceded with regard to implied terms in contracts that there is an element of fiction involved — "a fiction because it does not correspond with anything that was in minds of parties at the time", to quote the language of Lord Sands in a Scottish case (*Scott v. Del Sel*[6]). But it also must be borne in mind in this connection that there are limits to the Court's powers to import implied terms. The matter was stated in the following language by Lord Wright in *Luxor (Eastbourne) Ltd. v. Cooper*[7] :—

"There have been several general statements by high authorities on the power of the Court to imply particular terms in contracts. It is agreed on all sides that the presumption is against adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intend should govern their agreement, whether oral or in writing. But it is well recognised that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying", some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties."

In my opinion there are no grounds in the present case for the Court to imply further terms in the second clause of the agreement. I cannot guess what terms the parties would have reached had they agreed to cover the contingency of part of the chattels being no longer available to be returned on the expiration of the hiring. There is then no ascertainable intention of the parties, no term of which it can be said that "it goes without saying", as I see the matter, to which the Court could give effect. I reach the conclusion, therefore, that *Taylor v. Caldwell*[5] does not apply to this case and that, subject to certain points I shall deal with later, the defendant is liable to pay rent in accordance with the second clause of the agreement from 16th August 1946.

Having found that there is a general liability on the part of the defendant to pay rent (or remuneration equivalent thereto) as long as he retains the chattels I have now to consider whether any circumstances exist to modify such liability.

In this connection the question arises what is the position with regard to those chattels removed by the Japanese in the removal of which the plaintiff willingly acquiesced. I do not think there can be any doubt that when an owner himself arbitrarily removes chattels from the possession of a party to whom he has hired them no liability can rest on the part of latter to pay rent for these particular chattels in respect of any period subsequent to their removal (*Stirling v. Maitland*[8]). Between such a case and the present one in which I am satisfied that the plaintiff was either an instigator of, or at least an active and willing party to, the removal of certain of the chattels, I do not think any distinction can be drawn. It is therefore necessary for me to enumerate the items which I hold fall within this category, and in respect of which I consider no further rent is payable. They are :—

(1) The dynamo and bundle of wire referred to in Ex. D17.

(2) The rails at Pelantok.

(3) The two motor-cycle tyres referred to in Ex. D13.

(4) House 128 Kemaman and its contents.

The facts on which I base these findings are as follows. As regards (1) and (2) I accept the evidence of Dato Bendara Luar and of the record made by him which is contained in Ex. D17 as to the plaintiff's admissions in December 1944 she then had possession of the dynamo and the bundle of wire, and that she had borrowed $17,000 in respect of the rails at Pelantok. When Dato Bendara Luar was in the witness box it transpired that the wording of the official translation,

"Regarding articles at Pelantok Lee Sau Keng stated not sold but have borrowed $17,000. Regarding rails at Pelantok they have been loaned to Nichinan Kemaman" was not altogether accurate, and that what plaintiff did say was that she had not sold the articles at Pelantok, but that she had borrowed $17,000 in respect of the rails. As regards (3) the defendant's statement that the tyres were removed by a representative of the plaintiff is corroborated by the receipt produced (Ex. D13). As regards (4) I am satisfied on the strength of the evidence of Aman bin Amin, a witness for the defence, and of the plaintiff's own reluctant admission she approached the Nipponese Mining Company for rent in respect of it, that the plaintiff took over control of the house at a fairly early stage of the Japanese Occupation, and since she chose to meddle in the matter in this fashion I cannot think the defendant should be held responsible for what happened to the house and its contents subsequently. Had the plaintiff not, as it were, brought the house to the notice of the Japanese it is conceivable the explosion which lead to its destruction would not have occurred. Before leaving this matter I should add that, while I appreciate the defendant stated the plaintiff told him when she visited Bundi in September 1943 she had sold the houses, the furniture and the land to the Japanese Mining Company, I am not prepared to hold it proved the plaintiff had a part in the removal of any of the other articles beyond those I have specified, particularly as the defendant stated that when he left Bundi in February 1944 the chattels were still more or less in their original condition.

A further point which requires mention is that the defence brought evidence which I accept, that certain of the chattels were destroyed by bandit activity in 1948. I agree with Mr. Rintoul when he submits that the same legal position arises in respect of these chattels as arises in respect of those affected by the hostilities with the Japanese, and consequently I reach the same conclusion with regard to those destroyed by bandits, that the defendant is not exempted under the terms of the agreement from liability to pay rent.

I do not think that there are any further features of the care which affect the defendant's liability to pay rent subject to the qualifications I have mentioned. It will be observed that he could have avoided all further liability for rent after December 1941 had he handed back to the plaintiff after the War all the surviving chattels at any time before work was resumed. (The question of liability for the loss of those he was not in a position to hand back, had he taken that course, is not one which concerns the Court now). He has chosen, however, to utilise the surviving chattels, and, I am prepared to accept, has in several instances repaired or restored them. Nevertheless he is, in my opinion, liable for rent or equivalent remuneration at the agreed rate (less a proportion in respect of the chattels to the removal of which the plaintiff was a party) as long as he retains the chattels.

One final point with regard to the plaintiff's claim must be considered. The defendant asks a set-off in his favour in respect of sums amounting to $3,600 paid by him to the plaintiff and to two daughters of the deceased by a previous marriage, in their capacities of beneficiaries of the estate, before the plaintiff obtained Malayan Letters of Administration in July 1948. As the plaintiff had not at the date of these payments succeeded in having her Japanese Grant of Letters of Administration substituted, and the position, therefore, was open to doubt, it would, I think, be inequitable not to allow the set-off claimed.

On the plaintiff's claim I give judgment for the plaintiff for rent due on the chattels (or alternatively for remuneration for the use of the chattels in so far as the agreement may have ceased to have had effect through expiry of the sub-leases), for the period 16th August 1946 to the date of judgment in this suit, at the rate of $600 per month, less such proportion of that rate as shall be deducted in respect of the chattels enumerated above for which I have held the defendant to be under no liability for further payments. This proportion will be determined by enquiry unless the parties within three months of the date of judgment inform the Registrar that they have mutually agreed as to what percentage of $600 such proportion shall be. There will also be deducted from the sum payable to the plaintiff the set-off of $3,600 referred to in the previous paragraph. In the plaints (both Original and Amended), which were filed in 1949, the prayer asks for interest from the date of judgment. This matter is now adequately covered, I think, by 1950 Supreme Court Rule No. 3. I award the plaintiff costs on her claim, but in the event of an enquiry being necessary determination of such costs will await final judgment.

I now turn to consideration of the Counter Claim. It is based on the two sub-leases already referred to, dated 27th June 1940, of Bundi and Pelantok mines, or to put the matter more precisely, of the lands comprising the Bundi concession and of the lands covered by four Mining Certificates, Nos. 39, 45, 53 and 57 Mukim Tebak Kemaman. Certified translations of the sub-leases are attached to the Statement of Defence and Counter Claim, and are marked "D4" and "D5".

Now it is not in dispute that at the date of the execution of the sub-leases the estate of the deceased or the Administrators thereof were indebted to the Straits Trading Company Limited and William Jacks and Company Limited in the sum of $75,000, and that the sub-leases provided firstly for payment by the defendant to these creditors of that sum, such sum to be considered as tribute payable under both of the sub-leases for a period of four years, and secondly for payment of tribute at the rate of 10% on all ore removed from the said lands after the expiry of the four years. It is also common ground that the defendant duly paid the sum of $75,000 to the creditors named.

The provisions I have referred to are contained in the first clause of each of the sub-leases. The clause relating to the Bundi concession reads :—

"That the sub-lessee shall pay to us or to our duly appointed agent tribute on all ore removed from the said lands at the rate of 10% after having paid Government duties i.e. on the monthly output of the ore and other products worked for and removed after the date of the expiration of the first four years of the Sub-Lease; that the Sub-Lessee shall in the first instance pay a sum of $75,000 which is treated as tribute for the period of the first four years of the Sub-Lease in order to settle the debts of the estate of Lui Ah Hon deceased with the Straits Trading Co., Ltd. and William Jacks & Co., Ltd., Singapore and that no further tribute shall be paid during and for the period of the four years. The payment of $75,000 and the ten percent (10%) tribute referred to is the tribute payable to us on the sub-lease of the lands comprised in Bundi Concession and Freda Mine and on the sub-lease of the lands comprised in the Mining Leases Nos. M.C. 39, 45, 53 and 57 in the mukims of Bundi and Tebak both of which have been amalgamated in a separate document also made to-day."

The clause relating to the Pelantok lands is identical, except that the final sentence reads :—

"The payment of $75,000 and the ten percent (10%) tribute referred to is the tribute payable to us on the Sub-lease of the lands comprised in Mining Leases Nos. M.C. 39, 45, 53 and 57 and on the sub-lease of the lands comprised in Bundi Concession in the mukims of Bundi and Tebak both of which have been amalgamated in a separate document also made to-day."

The defendant now claims that he is entitled to have returned to him part of the $75,000 by reason of a clause (number seven) which appears in both of the of the sub-leases. The material portion of this clause reads :—

"That during the period of the first four years of this sub-lease should Yong Hon Fa be forced to stop work on all the mining lands on account of act of Providence, fire, earthquakes, floods, lightning, war, no price of ore and such-likes, the administrators of the estate shall prolong the sub-lease to such an extent as to cover the period lost in order to complete the four years."

It is convenient at this stage to refer to certain evidence which has a bearing on this issue. On 24th June 1940, three days before the sub-leases were signed, the plaintiff, the defendant and the two Administrators of the estate at that date appeared before the State Commissioner, Kemaman, Tengku Wira bin Din, in connection with the granting of the sub-leases. The record of these proceedings was admitted in evidence, and the official translation is Ex. DIOT. Now it appears clear from this record that before the State Commissioner the parties agreed in the event of any of the occurrences subsequently named in the portion of the seventh clause of the sub-leases set out above arising to stop work part of the $75,000 should be "refunded according to time". Mr. Powell for the plaintiff submitted this evidence was inadmissible. In arguing that the evidence in question was admissible Mr. Rintoul contended that it would assist the Court in interpreting the portion of the seventh clause I have referred to, and in particular the words "shall prolong the sub-lease to such an extent as to cover". Whether I was right or wrong in admitting this evidence I have now reached the conclusion after due consideration of Mr. Rintoul's careful submissions the evidence of the proceedings of the 24th June does not help in the interpretation of the penultimate paragraph of the sub-leases. I am now of the opinion its meaning is perfectly clear as it stands. I would put the matter this way. Suppose between 27th June 1940 and the 27th June 1944 a war had occurred which stopped work for exactly one year, I suggest there can be no doubt that the effect of this condition would have been to place the administrators under an obligation to prolong the sub-leases to 27th June 1945 without further payment beyond the $75,000 on the part of the defendant. As it was there was a war which stopped work from 12th December 1941 to the end of the four year period; the administrators thereby incurred liability to prolong the sub-leases to an extent equal to the time between the 12th December 1941 and the 27th June 1944. But nowhere in the sub-leases is there, it appears to me, any undertaking, express or implied, for the refund of the $75,000 or part thereof in consequence of the contingencies set out in the penultimate sub-paragraph of the sub-leases. Apart from this the provision for the sub-leases being prolonged appears to me inherently inconsistent with any "refund according to time". The provision plainly relates to the period of the "first four years." Moreover the contemplated extention of the sub-leases would be pointless except in relation to that period, since in any event the sub-leases were to continue until the expiry of the concessions, or indeed until later should the concessions be extended. As I see the matter the sub-clause in question was obviosuly included to ensure that Yong Hon Fa would get his "money's worth" for the four years in respect of which he had paid the $75,000. It is scarcely conceivable he was not only to get a refund of part of the $75,000 in respect of any

period he was stopped from work, but also an additional period to work in lieu of it. It may be the parties deliberately departed in this respect from what they had agreed to in the presence of the State Commissioner. Whatever happened I am now of the view that the evidence of the proceedings before the State Commissioner cannot properly be taken into account in interpreting the sub-leases.

Mr. Rintoul in the course of addressing the Court stated that if the evidence of the proceedings before the State Commissioner was held to be inadmissible, the defendant for the purpose of Counter Claim relied on the further ground of failure of consideration. As I now hold the evidence in question cannot be correctly invoked to interpret the sub-leases I proceed to the question of failure of consideration. Mr. Rintoul in putting the authorities on this matter very fairly and lucidly before the Court admitted that he was confronted with an obstacle which arise from the general rule that a claim for money had and received is not maintainable where there has been only a partial failure of consideration. In stating this rule *Chitty* on Contracts (20th Ed. p. 101) says :—

> "This is based on the theory that the consideration is "whole and indivisible", and the Courts will not divide or apportion it unless the parties have done so, and also because the parties could not be placed in the same situation in which they respectively stood when the contract was entered into."

Mr. Rintoul submits the consideration in this case was clearly intended to be divisible. I concede that if the evidence of the State Commissioner concerning the proceedings on the 24th July 1940 can properly be taken into consideration it might well be regarded as an indication of some strength that this was the intention. But I find it difficult in the light of the language of the sub-leases to accept the view that the $75,000 was divisible consideration, whatever proposals which would have led to a different position may have been mooted during the preliminary negotiations. It is stated in the sub-leases that the $75,000, which was to be treated as tribute for the period of the first four years, was to be devoted to the payment of the debts of the deceased's estate to the Straits Trading Company Limited and William Jacks & Co., Ltd. The agreement of the defendant to pay this sum in the first instance may well have been a decisive inducement to the deceased's administrators to grant the sub-lease. The defendant, for his part, presumably thought it worth his while to accept this stipulation. The indications are, I think, the making of this payment of $75,000 in a lump sum was a material part of the consideration given by the defendant. It is hard to see how it could be regarded as divisible. The provision for the extension of the sub-leases to cover any period of work lost through the causes specified is, in my opinion, an additional reason for holding the consideration not divisible. I do not think there is anything in either *Anglo-Egyptian Navigation Company v. Rennie & Anor.*[9] or in *Biggerstaff v. Rowatt's Wharf Limited*[11] cited on his behalf, to turn the scales in the defendant's favour in this matter. In the latter case one company bought 7,000 barrels of oil from a second company and paid for them. The second company failed to deliver part of them. It was held that the contract was severable and that, since there was a total failure of consideration as regards the barrels not delivered, the first company could sue for money had and received in respect of the barrels not delivered. In the present case can the $75,000 which, admittedly, was in lieu of tribute for the first four years, be apportioned into forty-eight parts and each fraction be regarded as one month's tribute? In my opinion it cannot. In addition to the reasons I have already mentioned which to my mind point to this conclusion it seems not unlikely that the administrators preferred to accept $75,000 for the first four years rather than the possibility of receiving a greater sum for that period from tribute payable on a monthly basis just because in so doing they were obtaining a definite and finally determined amount.

Even if I am wrong in holding the consideration is not divisible I do not see how the parties can be put into the same situation in which they respectively stood when the contract was entered into. The defendant might perhaps be regarded as restored to this position, if, having had his value's worth from 27th June 1940 to 12th December 1941, he was to be refunded a proportionate balance of the $75,000 for the outstanding period of the four years. I do not see, however, in what way the plaintiff as successor to the original administrators can be restored to their original position. They were in June 1940 the lessees of two mining concessions in good working order with a "life" of several years to go. Whatever order this Court might make it has no power to restore to the plaintiff these lapsed mining interests.

I find myself unable, therefore, to hold that the Counter Claim can succeed on this ground either.

One further matter should be mentioned. The Counter Claim is admittedly based on Clause 7 of each of the sub-leases. It seems to me an action might possibly lie in consequence of the failure of the administrators to cover the period lost in order to complete the four years. Since however, the Counter Claim has in fact been expressly stated to be an action for money had and received, and the plaintiff has

contested it on that basis, I think it would be outside my province to pursue consideration of this possibility further.

The Counter Claim is dismissed with costs. Counsel for the plaintiff asked for costs on the higher scale, but did not specify the ground on which he based this application. As I am not satisfied as to the existence of special grounds I am not prepared to grant Mr. Powell's application.

Judgment accordingly.

SERANGOON GARDEN ESTATE LTD. v. ANG KENG.

[A. C. J. (Brown, J.) January 19, 1953]

[Singapore — District Court Appeal No. 29 of 1952]

Practice and Procedure — Stay of execution — Principles upon which stay can be granted.

This appeal was brought against an order of the District Court granting a stay of execution in a possession case pending appeal.

Held: the granting of a stay of execution, though discretionary, should be exercised on correct principles. The fact that the defendant cannot be restored to his original position if his appeal succeeds is not a sufficient ground. It might be an important factor to be taken into consideration if there were other grounds, for example, that there were merits in the appeal.

DISTRICT COURT APPEAL.

N. L. Macassey for the appellants.

Respondent unrepresented.

Cur. Adv. Vult.

Brown, J. : — This is an appeal from an order granting a stay of execution in a possession case. The order for possession had been made upon the ground that the defendant had used or permitted the premises to be used for an illegal purpose, viz. the keeping of pigs without a licence from the Rural Board.

The application for a stay of execution was not made at the conclusion of the case, and when the application was subsequently made no affidavit in support was filed. The learned District Judge explains this upon the ground that the plaintiff's counsel, while drawing attention to the absence of an affidavit, took no objection upon that ground, and as the facts were within the knowledge of the Court the application was heard as if it had been made at the conclusion of the case. In this Court counsel for the appellant does not agree that he took no objection before the learned District Judge.

The learned District Judge had a discretion to grant a stay of execution. And I should not think it right to interfere with the exercise of his discretion if I was satisfied that he had exercised it on correct principles. There is no rule of practice limiting the exercise of his discretion. But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can shew special circumstances to justify it. The only ground, so far as appears in the written grounds for granting this stay, is that if the defendant succeeded in his appeal he could not be restored to the same position as before because the plaintiffs would have removed his pig-sty. That ground, standing alone, in my opinion cannot be a sufficient ground on which to grant a stay of execution. It seems to me that to hold otherwise would be to establish a precedent, and in effect to lay down a rule of practice, that in all cases where the defendant cannot be restored to his original position if his appeal succeeds, a successful litigant is to be deprived of the fruits of his litigation until such time as the appeal is determined. Such a ground might well be an important factor to take into consideration if there were other grounds. If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances to justify the learned District Judge in exercising his discretion to grant a stay; and I should not have thought it right to interfere.

In the absence of an affidavit I have considered whether any special circumstances which could justify the order for a stay of execution can be found in the Record of the trial or in the learned District Judge's Grounds of Decision in the action. I can find none. I am therefore left in this position :—

(1) there is no affidavit setting out the special circumstances which are alleged;

(2) the Record discloses no special circumstances;

(3) the only ground given by the learned District Judge for granting this stay does not amount to special circumstances which would justify it.

The appeal must therefore be allowed. No order as to costs.

Appeal allowed.